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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 249

LIVINGSTON H. McCREA, PETITIONER

v.

THE UNITED STATES OF AMERICA, AS OWNER OF THE S.S. "American Shipper", Engines, Tackle, Apparatus, etc.

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The first opinion of the District Court (R. 102–107) is reported in 3 F. Supp. 184. The opinion of the District Court upon rehearing (R. 110–115) is reported in 3 F. Supp. 187. The opinion of the Circuit Court of Appeals (R. 145–159) is reported in 70 F. (2d) 632.

JURISDICTION

The decree of the court below was entered May 7, 1934 (R. 150). The petition for a writ of cer-

tiorari was filed August 3, 1934, and granted October 8, 1934. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the United States is liable under Section 3 of the Seamen's Act of 1915 for double wages during the period of delay in payment of a seaman's wages.

2. Whether the petitioner, who left the ship on which he was employed as a seaman because of the respondent's violation of Section 2 of the Seamen's Act of 1915, is entitled to one month's additional wages and other relief provided for by Revised Statutes, Section 4583.

3. Whether the trial court erred in entering the decree of March 9, 1933, without formal order vacating former judgments or orders.

4. Whether respondent was required to plead that the penalty claimed could not be enforced against the United States.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra,* pp. 25–28.

STATEMENT

No special finding of fact was made by the District Court.

Petitioner was employed as a fireman on the vessel "American Shipper" on or about February

15, 1928 for a voyage New York to London and return, at a wage of $65.00 per month (R. 102).

The ship arrived in London on Sunday, February 26, 1928, and while the master was advancing money to the members of the crew who were to take shore leave, petitioner demanded his discharge with full pay, additional wages for one month, and his passage home. In support of his demands petitioner quoted the titles of Section 2 of the Seamen's Act and Section 4583 of the Revised Statutes (R. 14, 19, 31, 40, 42). Petitioner had made no complaint of any kind during the voyage, and gave no explanation of the reasons for this demand (R. 120) and the master from the title of the Act and section number of the statute did not know the basis of the claim. The master testified (R. 46):

> It was necessary for me, after I got through advancing the money to go up and look up that law, look up this title, before I realized why he demanded that money.

The master did not refuse the demand but told the petitioner he would have to see him at the American Consulate (R. 40). Petitioner was given directions as to the location of the Consulate and informed that the Captain would be there sometime the next afternoon, Monday (R. 41). The Captain went to the Consulate about two o'clock the next day (R. 41), but petitioner was not there and the Captain never saw him again (R. 42).

The record shows that petitioner appeared at the Consulate Monday morning (R. 21, 83) before the

hour of appointment with the Captain, made an oral statement to the officers of the Consulate, and was advised that he was not entitled to a discharge on his own statement. Upon petitioner making request for a written finding, the Consul required petitioner to furnish a written statement of facts (R. 95), and the Consul formally in writing the next day gave an opinion that petitioner was not entitled to a discharge (R. 97). This opinion was sent to petitioner at the ship, but as petitioner had quit the ship and left no address, the opinion was never delivered to him.

The Captain was on the ship every day while in the port of London (R. 44), but petitioner made no further demand, and did not see the Captain, though he claimed to have knocked on the Captain's door Monday night and early Tuesday morning. The petitioner quit the ship on Tuesday after asking the mate for a pass for his clothes, which the mate could not give (R. 15).

Petitioner knew that the ship was to sail on Friday, March 2nd (R. 27) but did not return to the ship after Tuesday, February 28th. He was, therefore, logged as a deserter (R. 93). He visited relatives in England for three weeks and then returned to the United States and brought this suit in July, 1928.

The certificate of inspection of the American Shipper required six able seamen and two ordinary seamen. The actual complement was eleven able seamen and two ordinary seamen. The sea-

men were not, while at sea, divided into watches as equally as that number permitted. Petitioner himself, however, was on one of the regular watches, that from 8:00 to 12:00.

The District Court on August 15, 1932, entered a decree in favor of the petitioner in the sum of $6,456.83, with interest at four percent. The amount of wages due the petitioner on that date was $28.95. The balance of the judgment was made up of the sum of $40 for loss of clothing and effects, $42.50 costs, and two days' pay for one at the rate of $4.33 per day, or $130 per month, from July 11, 1928; the net result being $111.45 actually due and $6,262.88 penalty (R. 109). On rehearing this decree was modified, eliminating the double wages, and the amount of the recovery was reduced to $132.82 with interest and costs (R. 115–116). This decree was affirmed by the Circuit Court of Appeals (R. 145).

SUMMARY OF ARGUMENT

I

The phrase of the statute "without sufficient cause" does not mean that there must be a valid legal excuse or reason for not paying wages, but that there must be conduct in some sense arbitrary or willful. The statute is not intended to penalize ships and owners where, as in this case, there was no unscrupulous intent or purpose to deal with the petitioner unjustly or unfairly. Petitioner did not

give the master reasonable time or opportunity to consider the matter. The record clearly discloses that the master acted in good faith and did not at any time refuse to make payment.

II

The statute is one of punishment; it calls for an extraordinary liability not limited to damage suffered. It so clearly carries in its spirit and purpose the idea of punishment that it must be deemed a penal statute.

III

The Suits in Admiralty Act of March 9, 1920, substituted an action *in personam* for one *in rem,* but created no new liability on the part of the United States. The United States has not consented to be sued in a case of this nature, where it is contended the United States is subject to a fine for the act of its agent or servant.

IV

Petitioner's complaint was acted upon adversely to him by the American Consul and petitioner departed the ship without cause and without leave, with intent not to return. He did not return although he knew when the ship was to sail. He therefore clearly has no claim under R. S. 4583 (U. S. C., Title 46, Sec. 685). Petitioner cannot recover under both Section 2 of the Seamen's Act and R. S. 4583.

The court below had jurisdiction to amend its decree at any time before appeal was taken, and no pleading of a jurisdictional nature is necessary.

ARGUMENT

I

THE UNITED STATES IS NOT LIABLE UNDER SECTION 3 OF THE SEAMEN'S ACT OF 1915 FOR DOUBLE WAGES DURING THE PERIOD OF DELAY IN PAYMENT OF A SEAMAN'S WAGES

A. The failure to pay petitioner was not "without sufficient cause." There was nothing arbitrary, unscrupulous, or willful in the behavior of the Captain; on the contrary, he acted in good faith

This Court, in *Collie* v. *Fergusson,* 281 U. S. 52, construing Section 4529, R. S. (now Section 3 of the Seamen's Act of March 4, 1915, *infra,* pp. 26–27) said (p. 55):

> The phrase "without sufficient cause" must be taken to embrace something more than valid defenses to the claim for wages. Otherwise, it would have added nothing to the statute. In determining what other causes are sufficient, the phrase is to be interpreted in the light of the evident purpose of the section to secure prompt payment of seamen's wages * * * and thus to protect them from the harsh consequences of arbitrary and unscrupulous action of their employers, to which, as a class, they are peculiarly exposed.
>
> The words "refuses or neglect to make payment * * * without sufficient cause"

> connote, either conduct which is in some sense arbitrary or wilful, or at least a failure not attributable to impossibility of payment.

The Circuit Court of Appeals for the Fourth Circuit in *The Velma L. Hamlin,* 40 F. (2d) 852, discusses the various decisions on this question and holds (p. 854):

> The same rule applies in all cases where the failure to pay is due to the fact that payment is withheld in good faith under a reasonable belief that same is not due. The statute was intended to penalize shipowners who, without sufficient causes, withhold the wages of seamen. It was not intended to prevent them from contesting in good faith their liability for demands made upon them or to subject them to ruinous penalties, if, upon a contest made in good faith, it should turn out that they were wrong.

In *The Easterner,* 47 F. (2d) 605, the same court held (p. 606):

> Under the decision of the Supreme Court in *Collie* v. *Fergusson* et al., 281 U. S. 52, 50 S. Ct. 189, 74 L. Ed. 696, and of this court in the *Lake Gaither,* 40 F. (2d) 31; *The Velma L. Hamlin,* 40 F. (2d) 852, and *The Corapeak,* 46 F. (2d) 262, decided January 13, 1931, the rule is well established that, in order to permit the recovery of waiting time by a seaman, refusal to pay his wages must not have been "in some reasonable degree morally justified." An examination of the record here shows no arbitrary or unjust

> action on the part of the master, but on the contrary, shows that he acted in a reasonable manner throughout. If there was any conduct that could not be justified, it is the conduct of the appellant himself and not that of the master.

In the dissenting opinion of Judge Coleman in *The Sonderborg*, 47 F. (2d) 723 (C. C. A. 4th), certiorari denied, 284 U. S. 618, it is said (p. 733):

> The statute is admittedly a harsh one, and whether or not it should be invoked is, of course, not to be determined by the amount of the penalties. But the shipowner, as well as the seamen, has rights which must be protected, and the very fact that the act is oppressive demands a very careful scrutiny of the facts in each case. The total amount of the wages withheld from the seven seamen, and to which I agree they are entitled, is approximately $400, whereas the penalties allowed by the lower court aggregate approximately $3,600—a sum nine times as great. It seems unconscionable to interpret the statute as saying, or that its framers ever intended, that such virtual confiscation should be practiced under it in a case like the present one, where the master has throughout merely endeavored to discipline members of his crew, and to conform to the immigration laws in a matter dictated by his own honest and reasonable, although erroneous convictions.

In a well-considered opinion in *The Thomas Tracy*, 24 F. (2d) 372 (C. C. A. 2d), in which cer-

tiorari was denied, 277 U. S. 595, it was held that where a master refused to pay seamen their wages under an honest misconstruction of the meaning of terms in shipping articles the penalties under Section 4529 were not recoverable. The court said (p. 374):

> The statute does not mean that the refusal to pay wages must be based upon a legal defense to the wages. It means that, although it may ultimately be determined that there is no actual legal defense to the claim for wages, nevertheless, if the owner or master had sufficient cause to withhold the wages, when demanded, beyond the time mentioned in the statute, it relieves the vessel of the imposition of the penalties.

Under the law the master had four days after demand for wages within which to pay them. In the instant case the good faith of the master is shown, and the fact that he did not finally refuse to pay the wages, by his making an appointment to meet libelant at the American Consulate. No discharge could be made otherwise. The Consular Regulations provide:

> A master cannot lawfully discharge a seaman in a foreign port without the intervention of the consular officer; and it is not material in such case that the discharge is made with the seaman's consent, or that he has misconducted himself, or is not a citizen of the United States. (Consular Regulations, libelant's Exhibit 4, R. 98.)

In the instant case there seems to be no dispute as to the facts and it stands out as a guiding light that libelant was sort of a sea lawyer, that he knew the law with reference to the division of watches, that while, in the light of a decision rendered shortly before this transaction but not promulgated in Great Britain, there may have been a technical violation of the statute with reference to equal division of watches, yet this seaman participated throughout the voyage without complaint or objection, concededly having knowledge of the law and its alleged violation, and immediately set out on a program of recovering extra moneys. Waiting until his ship arrived in London, he demanded his discharge and additional pay and to be provided adequate employment on another vessel back to New York and quoted by section number and title the law involved in this case. He made his demand while the master was advancing money to members of the crew who were about to take shore leave. The master did not recognize the law referred to by section number and title and said he would have to look it up. He declined at the moment to pay libelant more than half the wages due but asked libelant to meet him the next afternoon at the American Consulate to "thrash this thing out" (R. 19). Instead of meeting the master, libelant the next morning made oral demand of the Consulate in the absence of the master and left the Consulate before the master arrived. The next

day libelant departed the ship without seeing the master although the master was on the ship every day it was in port (R. 44). Libelant made no further appearance or claim but remained visiting relatives, in England for about three weeks and then several months later in New York filed this suit without previously making any further request or demand for payment. It is clear that in the opinion of the master there was a real reason to discuss the matter with the libelant in that the question of the division of watches, as now claimed, was based upon the number of seamen on the vessel. The facts with reference to this are that more seamen were carried than the law required and it was the opinion of the master that the division of watches was properly fixed upon the basis of the legal requirement and therefore there was no violation of the statute.

A few days previously one of the Federal courts had held to the contrary in a case where the complaining seamen were not placed on any watch, but naturally the opinion could not have been known by the master at that time. It is apparent that there was an honest belief on the part of the master that there was a question to be considered. Undoubtedly his action was not arbitrary or capricious or with intent to humiliate. On the other hand, if the libelant had been acting in good faith, had kept his appointment, or had again seen the master and discussed the matter with him, the de-

lay might not have occurred. Libelant's bringing suit several months later without further request indicates clearly a desire to profit by the enforcement of the penalty. These facts, taken into consideration with the unconscionable result that six or seven thousand dollars are now demanded "as wages", when the original wage due was $28.95 (R. 109), constitute elements to be given equitable and moral consideration (as held by this Court) in determining whether or not the refusal was "without sufficient cause." Upon them the Circuit Court of Appeals held "One of his [petitioner's] reasons for becoming a member of the crew of this ship was to take advantage of any violation of the law" (R. 145). We submit that upon these considerations this penalty, exaction or compensation, whichever it may be termed, should not be allowed.

B. The statute assessing double wages is punitive in character and therefore not enforceable against the United States

Statutes imposing penalties are not applicable to the United States unless it clearly appears that Congress intended the penalty to be enforced against the United States and has granted permission for suit to be brought against them. This is because unless such intention is clearly and unequivocally expressed it cannot be held that Congress intended to compensate any person damaged through a violation of a statute by the agents or servants of the United States by punishing the

United States therefor and taking money from the United States Treasury. *Missouri Pacific R. R. Co.* v. *Ault,* 256 U. S. 554, 563. It therefore becomes at once important to determine whether the nature of this statute is penal or purely compensatory. It is not the use of particular words which determines the nature of a statute. As said by Mr. Justice Sutherland in *United States* v. *La Franca,* 282 U. S. 568, 572, in differentiating a tax and a penalty, "a penalty, as the word is here used, is an exaction imposed by statute as punishment for an unlawful act. The two words [tax and penalty] are not interchangeable, one for the other. No mere exercise of the art of lexicography can alter the essential nature of an act or a thing; and if an exaction be clearly a penalty it cannot be converted into a tax by the simple expedient of calling it such." So in the statute at bar, the expression that the "sum shall be recoverable as wages" cannot convert into compensation the penalty of double wages for "refusal or neglect" to pay. Neither the word "compensation" nor the word "penalty" appear in this statute.

In *O'Sullivan* v. *Felix,* 233 U. S. 318, 324, this Court said:

> The term "penalty" involves the idea of punishment for the infraction of the law, and is commonly used as including any extraordinary liability to which the law subjects a wrongdoer in favor of the person wronged, not limited to the damages suffered.

The statute clearly conveys in its essence, spirit and purpose the idea of punishment and it therefore must be deemed to be a penal statute. However the money exacted be designated—wages, compensation or damages—the result and effect of enforcement remain a punishment and penalization of the violator of the statute.

In the last analysis, the assessment of the additional sum in this case would be a fine upon the United States for the wrongful act of an agent of the United States. It can have no other real effect.

In *Cox* v. *Lykes Brothers,* 237 N. Y. 376, Mr. Justice Cardozo writing the opinion, it was held that in a case arising before the passage of the Merchant Marine Act of June 5, 1920 the State courts had jurisdiction of an action arising under Section 4529. The question of penalty was considered in connection with the jurisdictional question. The opinion in part is based upon that in *Calvin* v. *Huntley,* 178 Mass. 29, 32, which interpreted Section 4527 of the United States Revised Statutes which contains language different from that used in Section 4529. The opinion by the Massachusetts court stresses the wording of the statute, for the court says (p. 32): "It speaks not of punishment but of compensation". The statute uses this language:

> * * * and may, on adducing evidence satisfactory to the court hearing the case, of having been improperly discharged, *re-*

> *cover such compensation* as if it were wages duly earned. [Italics supplied.]

It is to be noted that Section 4529 involved in the instant case contains no such language and a fair implication is that the elimination of the words "recover such compensation" indicates an intent of Congress that "compensation" be not considered in the construction of Section 4529, and the reference is solely to the manner of collection, namely, "as wages are recoverable."

In the *Lykes Brothers* case the court did not have before it for consideration the question as to whether a statute of this character, which is referred to as making an "exaction", could be enforced against the United States. The court there was dealing with an Act which "contemplated a corporation in which private persons might be stockholders" and held that such a corporation, although all the stock in fact was held by the United States, was engaged in private business. The situation is entirely different under the Merchant Marine Act under consideration here. The title to all ships formerly held by the United States Shipping Board Emergency Fleet Corporation, considered by the New York court, is vested in the United States by the Merchant Marine Act of June 5, 1920. The holding of stock by private individuals is eliminated. Section 1 declares the policy and purpose of the Act:

> *Purpose and policy of United States.* It is necessary for the national defense and for the proper growth of its foreign and domestic commerce that the United States shall have a merchant marine of the best equipped and most suitable types of vessels sufficient to carry the greater portion of its commerce and serve as a naval or military auxiliary in time of war or national emergency, * * *.

This obviously constituted the Shipping Board, created under the Merchant Marine Act, a governmental agency and it is directly so held in *The Coldwater,* 283 Fed. 146 (S. Fla.), where the court says (p. 148):

> From this declaration [Section 1 of the Act above quoted] it is apparent that the United States, in the maintenance and operation of the merchant marine, is not engaged in a purely commercial enterprise, but that, on the contrary, Congress conceived that the establishment and operation of the merchant marine was the exercise of a governmental function of the highest importance, * * *.

In 1928, six years after the foregoing decision was rendered, Congress, in the Merchant Marine Act of May 22, 1928 (45 Stat. 689), expressly confirmed the declaration of policy of Section 1 of the Act of June 5, 1920 (41 Stat. 988).

C. The purpose of the Act of March 9, 1920, was to substitute an action in personam instead of in rem but it created no new liability nor does it grant consent for suits against the United States for the recovery of punitive damages

Petitioner in his brief states that it is "peculiar" that neither the District Court nor the Circuit Court of Appeals referred to the fact, as petitioner alleges, that the United States in enacting the Suits in Admiralty Act of March 9, 1920, 46 U. S. C. 741, 742, 746, divested itself of all sovereign character and waived immunity. It seems to us obvious that the reason neither of these courts referred to this matter is the fact that the holding of these courts that no penalty could be assessed against the United States of itself is a holding that the United States had not waived any immunity against penalties and had not consented to be sued therefor. The cases cited by petitioner are those dealing with the United States Shipping Board Emergency Fleet Corporation which was the corporation dealt with in the opinion by Mr. Justice Cardozo in *Cox* v. *Lykes Brothers, supra.*

The Suits in Admiralty Act abolished arrest or seizure of vessels or cargo owned by the United States and provided (§ 742):

> In cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action

> herein provided for, a libel in personam may be brought against the United States or against such corporation, as the case may be, provided that such vessel is employed as a merchant vessel or is a tugboat operated by such corporation.

No suit may be maintained against the United States without express consent. A suit for a penalty is of a different nature or character from the liability spoken of by this statute. Nowhere in the statute is there any consent given to permit suit to recover an exaction or penalty from the United States for failure to perform a duty by an officer or agent of the United States. Ordinarily interest and costs are not recoverable against the United States but the Suits in Admiralty Act provides that interest and costs may be recovered against them. Specific consent is thus given. If it were contemplated that penalties could be recovered and that consent be given to such recovery, Congress would have included in the statute a provision therefor similar to the provision for interest and costs. The principle is laid down by this Court in *Missouri Pacific R. R. Co.* v. *Ault*, *supra*, that the United States may not be sued in damages for the fault of an agent or servant and thus be fined unless consent be given expressly by statute. It is well settled that when the United States has given its consent to be sued the liability assumed is not to be extended beyond that clearly indicated by Congress.

Dupont de Nemours & Co. v. *Davis*, 264 U. S. 456, 462; *Davis* v. *O'Hara*, 266 U. S. 314, 317; *Missouri Pacific R. R. Co.* v. *Ault, supra; Eastern Transportation Co.* v. *United States*, 272 U. S. 675, 689.

A clear expression of this rule appears in the opinion of the Circuit Court of Appeals for the Second Circuit in *The Insonomia*, 285 Fed. 516, in which it was held that an act permitting a suit to be brought against the United States must be strictly construed, since the courts are confined to the letter of the statute which expresses the consent, and all its provisions are jurisdictional.

In the case of *Corrigan* v. *United States*, 298 Fed. 610 (S. D. N. Y.), this concise statement is made (p. 614):

> Neither the suits in Admiralty Act (Comp. St. Ann. Supp. 1923, §§ 1251¼–1251¼ 1) nor the Shipping Act of 1916 (Comp. St. §§ 8146a–8146r) contains any provisions whereby the United States is made liable for penalties.

Petitioner in his brief directs attention to an Act to amend Section 5 of the Suits in Admiralty Act pending before Congress in 1932 (Petitioner's brief, pp. 35–37). It is contended that the report of the Senate Committee on Judiciary (No. 771, 72d Cong.) and the report of the House of Repre-

sentatives (No. 1012, 72d Cong.) disclose there was intended an express waiver of immunity by the United States. The reports do not so disclose. On the contrary a reading of the full reports clearly establishes that the recognized object and purpose of the legislative Acts in question were merely to change the form of the remedy, and nowhere is there to be gathered any intent that there was any addition of any new liability or any consent to be sued thereon.

In the Senate Report (No. 771, 72d Cong.) referred to it is said:

> The main purpose of the suits in admiralty act was to prevent the further seizure of United States merchant vessels for such acts as made the ordinary commercial vessel subject to seizure, and to free the United States from the embarrassment of having to put up bonds for their release after seizure. In short, it substituted a remedy in personam against the United States in place of the preexisting right in rem.

In connection with this question there is also appended to the brief of petitioner a legislative history of the suits against the United States under the Suits in Admiralty Act. It is not believed that testimony before a committee of witnesses giving their theories and opinions as to what the purposes and objects of an Act should be, is competent or material.

II

THE AMERICAN CONSUL WAS NOT "SATISFIED OF THE TRUTH AND JUSTICE OF SUCH [PETITIONER'S] COMPLAINT" AND THEREFORE PETITIONER DOES NOT COME WITHIN THE PURVIEW OF SECTION 4583 R. S. PETITIONER CANNOT RECOVER UNDER BOTH SECTION 2 OF THE SEAMEN'S ACT AND R. S. 4583

Claim is made by libelant to one month's wages over and above the wages due and the cost of his transportation home, under R. S. 4583. Respondent confesses its inability to see any application of this section to the facts in the instant case. The statute provides that upon the discharge of a seaman in a foreign country by a consular officer it shall be the duty of that officer, upon being satisfied of the truth and justness of the seaman's complaint, to require the payment of wages and transportation home. In the instant case the consular officer did not discharge libelant but on the contrary found as a fact that libelant was not entitled to a discharge upon his own statement. It was not possible therefore for the master to treat the libelant as anything other than a deserter which we maintain he was both in fact and in law, as was held by the Court of Appeals in this case. Petitioner cannot recover under both Section 2 of the Seamen's Act and R. S. 4583. That these two statutes are not *in pari materia* and the provisions of Sec. 4583 are not applicable in cases of complaint

by seamen of violation of Section 2 of the Seamen's Act is held in an opinion of the Attorney General in which the history of the two enactments and all amendments thereto are exhaustively discussed. 35 Ops. A. G. 292, 297.

III

SINCE THE COURT HAD JURISDICTION OF THE CASE ON MARCH 9, 1933, THE ENTRY OF THE FINAL DECREE ON THAT DATE AFTER THE REHEARING ORDERED ON AUGUST 30 VACATED THE DECREE ENTERED ON AUGUST 15, 1932

Libelant's contention that the decree of August 15, 1932, entered obviously through error after request by respondent for a rehearing, was not set aside by the court's order on August 30 for a rehearing and the entry of final decree on March 9, 1933, is obviously without merit. The court had jurisdiction of the case at all times until the order was made allowing an appeal on May 16, 1933, and the entry of the final decree on March 9, 1933, unquestionably vacated any and all former decrees in the case. The former orders and decrees must be held to have been merged in or set aside by the final decree of March 9, 1933, which was the last and final expression of the court upon the questions at issue, and is the decree appealed from by libelant.

IV

THE QUESTION OF THE CONSENT OF THE UNITED STATES HAVING BEEN GIVEN TO BE SUED FOR PUNITIVE DAMAGES BEING JURISDICTIONAL NO PLEADING IN THAT REGARD WAS NECESSARY

The right of the court to entertain a suit against the United States is a question of jurisdiction. It is elementary law that jurisdictional questions can be raised at any time and no pleading is necessary as a basis for so doing.

CONCLUSION

We respectfully submit that the judgment of the court below was correct and should be affirmed.

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AUBREY LAWRENCE,
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DECEMBER 1934.

APPENDIX

Section 4583 of the Revised Statutes as amended (U. S. C., Title 46, Sec. 685) provides:

> Whenever on the discharge of a seaman in a foreign country by a consular officer on his complaint that the voyage is continued contrary to agreement, or that the vessel is badly provisioned or unseaworthy, or against the officers for cruel treatment, it shall be the duty of the consul or consular agent to institute a proper inquiry into the matter, and, upon his being satisfied of the truth and justice of such complaint, he shall require the master to pay to such seaman one month's wages over and above the wages due at the time of discharge, and to provide him with adequate employment on board some other vessel, or provide him with a passage on board some other vessel bound to the port from which he was originally shipped, or to the most convenient port of entry in the United States, or to a port agreed to by the seaman.

The Seamen's Act of March 4, 1915, c. 153, 38 Stat. 1164 (U. S. C., Title 46, Secs. 673 and 596), provides in part:

> SEC. 2. That in all merchant vessels of the United States of more than one hundred tons gross, excepting those navigating rivers, harbors, bays, or sounds exclusively, the sailors shall, while at sea, be divided into at least two, and the firemen, oilers, and water

tenders into at least three watches, which shall be kept on duty successively for the performance of ordinary work incident to the sailing and management of the vessel. The seamen shall not be shipped to work alternately in the fireroom and on deck, nor shall those shipped for deck duty be required to work in the fireroom, or vice versa; but these provisions shall not limit either the authority of the master or other officer or the obedience of the seamen when, in the judgment of the master or other officer, the whole or any part of the crew are needed for the maneuvering of the vessel or the performance of work necessary for the safety of the vessel or her cargo, or for the saving of life aboard other vessels in jeopardy, or when in port or at sea from requiring the whole or any part of the crew to participate in the performance of fire, lifeboat, and other drills. While such vessel is in a safe harbor no seaman shall be required to do any unnecessary work on Sundays or the following-named days: New Year's Day, the Fourth of July, Labor Day, Thanksgiving Day, and Christmas Day, but this shall not prevent the dispatch of a vessel on regular schedule or when ready to proceed on her voyage. And at all times while such vessel is in a safe harbor, nine hours, inclusive of the anchor watch, shall constitute a day's work. Whenever the master of any vessel shall fail to comply with this section the seamen shall be entitled to discharge from such vessel and to receive the wages earned. But this section shall not apply to fishing or whaling vessels, or yachts.

SEC. 3. That section forty-five hundred and twenty-nine of the Revised Statutes of the United States be, and is hereby, amended to read as follows:

SEC. 4529. The master or owner of any vessel making coasting voyages shall pay to every seaman his wages within two days after the termination of the agreement under which he was shipped, or at the time such seaman is discharged, whichever first happens; and in case of vessels making foreign voyages, or from a port on the Atlantic to a port on the Pacific, or vice versa, within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens; and in all cases the seaman shall be entitled to be paid at the time of his discharge on account of wages a sum equal to one-third part of the balance due him. Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court; but this section shall not apply to masters or owners of any vessel the seamen of which are entitled to share in the profits of the cruise or voyage.

The Suits in Admiralty Act of March 9, 1920, c. 95, Sec. 2, 41 Stat. 525 (U. S. C., Title 46, Sec. 742), provides:

> That in cases where if such vessel were privately owned or operated, or if such cargo were privately owned and possessed, a proceeding in admiralty could be maintained at the time of the commencement of the action herein provided for, a libel in personam may be brought against the United States or against such corporation, as the case may be,

provided that such vessel is employed as a merchant vessel or is a tugboat operated by such corporation. Such suits shall be brought in the district court of the United States for the district in which the parties so suing, or any of them, reside or have their principal place of business in the United States, or in which the vessel or cargo charged with liability is found. The libelant shall forthwith serve a copy of his libel on the United States attorney for such district and mail a copy thereof by registered mail to the Attorney General of the United States, and shall file a sworn return of such service and mailing. Such service and mailing shall constitute valid service on the United States and such corporation. In case the United States or such corporation shall file a libel in rem or in personam in any district, a cross-libel in personam may be filed or a set-off claimed against the United States or such corporation with the same force and effect as if the libel had been filed by a private party. Upon application of either party the cause may, in the discretion of the court, be transferred to any other district court of the United States.